NO. 41665-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

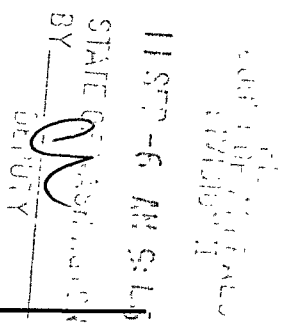
STATE OF WASHINGTON,

Respondent,

v.

DYLAN THOMAS NYLAND,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson

BRIEF OF APPELLANT

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1. The trial court erred in refusing to give a jury instruction on the definition of threat.

2. The trial court violated appellant's constitutional right to be present at all critical stages of trial.

3. Cumulative error denied appellant his right to a fair trial.

4. The evidence was insufficient to convict appellant of robbery in the second degree.

Issues Pertaining to Assignments of Error

1. Did the trial court err in refusing to give a proposed jury instruction on the definition of threat based on its misapprehension of the law that it would be error to give such an instruction in a robbery case? (Assignment of Error 1.)

2. Did the trial court violate appellant's constitutional right to be present at all critical stages of trial by communicating with the jury during deliberations in appellant's absence? (Assignment of Error 2.)

3. Did the trial court's combined errors cumulatively deny appellant his constitutional right to a fair trial? (Assignments of Error 1, 2.)

4. Was the evidence insufficient to convict appellant of robbery in the second degree where the State failed to prove beyond a

reasonable doubt that appellant took personal property against the will of a person by use or threatened use of immediate force, violence, or fear of injury to that person? (Assignment of Error 4.)

B. STATEMENT OF THE CASE[1]

1. Procedural Facts

On January 11, 2010, the State charged appellant, Dylan Thomas Nyland, with one count of robbery in the second degree and one count of unlawful delivery of a controlled substance. CP 1-2. Following a trial before the Honorable Frank E. Cuthbertson, a jury found Nyland guilty as charged. CP 61-62. The court sentenced Nyland to 16 months in confinement and 18 months of community custody. CP 72. Nyland filed a timely notice of appeal. CP 79-90.

2. Substantive Facts [2]

a. Trial

On November 30, 2008, Deputy Joanna Nicholson was dispatched to investigate an "armed robbery" at Walgreens. 2RP 63. Nicholson testified that she was the first officer on the scene "so I responded right to the store." 2RP 63. She contacted the pharmacist who reported that a

[1] There are eight volumes of verbatim report of proceedings: 1RP - 12/13/10; 2RP - 12/14/10, 12/15/10; 3RP - 12/16/10 a.m.; 4RP - 12/16/10 p.m.; 5RP - 12/20/10; 6RP - 12/21/10; 7RP - 12/22/10; 8RP - 01/07/11.

[2] In accordance with RAP 10.3 (4), the statement of the substantive facts encompass the facts relevant to the issues presented for review.

white male came into the store with a bag and asked for OxyContin. The pharmacist gave the man 12 to 15 bottles which contained over 1200 pills. 2RP 63, 65. Nicholson also spoke with another witness who was in the Walgreens parking lot and saw the suspect running out of the store. 2RP 65. She obtained written statements from the witnesses and retrieved a surveillance tape from Walgreens which she booked into evidence. 2RP 65-67.

Brittany Lyon works as a pharmacy technician at Walgreens. 2RP 5. Lyon testified that a "gentleman" came up to the counter and handed her a note that stated, "Please give me all your OxyContin." 2RP 5-6. The white male was dressed completely in black and wearing a ski mask that covered his face so she could only see his eyes. He was about five foot six. 2RP 7. Lyon was frightened even though he never said he had a weapon. When he handed her the note, he had his other hand in his pocket but made no indication that he had a weapon. 2RP 9, 13.

Lyon informed the pharmacist that a man wanted all the OxyContin. While the pharmacist was getting the OxyContin from the safe, she went to check on the man and he said, "please hurry up." 2RP 6-7. They gave him all the OxyContin that was kept in a safe because the policy of Walgreens is not to argue and "just do what they say." 2RP 7, 9-10, 13. She would just give the OxyContin to anyone who asked for it

whether she believed they had a weapon or not "because it is policy." 2RP 10, 13. The man said "thanks" and ran off. 2RP 10. They notified the store manager and the police arrived in about five to ten minutes. After giving a statement to police, Lyon went back to work. 2RP 10.

Sandra Roberts was formerly employed as a pharmacist at Walgreens. 2RP 16. Roberts testified that she was working in the back when a technician brought her a note from a man at the counter who wanted all the OxyContin, a brand name for oxycodine. 2RP 18-20. She went to the narcotics cabinet and put all the OxyContin in a plastic bin and triggered the alarm system. 2RP 19. The company policy was to "try to get a good description of the thief and give them what they want. No heroics." 2RP 19. Roberts went to the counter and saw a man dressed completely in black wearing a ski mask. He was slender and about five foot ten or six foot. 2RP 21. When she gave him the narcotics, he did not say anything. She did not see a weapon but was frightened. 2RP 21-22, 26-28. When the man left, the police had not arrived so she called 911 and they came almost immediately. 2RP 22.

Scott Bennett was in the Walgreens parking lot when he noticed a person wearing a hoodie with their face covered. 2RP 30. He could not tell if the person was a man or a woman. 2RP 37. Bennett testified that the person entered the store then came running out holding a Walgreens

bag with what looked like bottles of pills. 2RP 30-32. He followed the person in his car and saw the person get into the passenger side of a parked car. He never saw the person's face but saw the driver who was a white male in his mid-20s with scruffy hair and a scruffy beard. 2RP 30-31, 34. When Bennett lost sight of the car, he returned to Walgreens where he gave police a description of the car and a partial license plate number. 2RP 35-36. Thereafter, the police showed him a photo montage and he was at least 65 percent certain that one of the photographs was the driver of the getaway car. 2RP 36-38.

Joseph Shaffer and Nyland have been friends since high school. 4RP 80. Shaffer testified that he became addicted to OxyContin and needed to use it everyday. 4RP 82-83. He and Nyland talked about robbing a pharmacy quite a few times because he spent a lot of money on his habit and Nyland had a lot of credit card debt so it was "a good way to make money and a way for me to get high." 4RP 84-85. One day Nyland showed up at his house and said he "was ready to do it." 4RP 86. Nyland was dressed in black wearing a beanie and a bandana over his face. 4RP 86. Shaffer drove to Walgreens and parked a block away. Nyland went in the store for about five minutes and came running out. With a car chasing him, Nyland jumped in Shaffer's car and he "hit the gas and took off." 4RP 87-88.

Shaffer drove home where he left his car and they got in Nyland's car and went to his house. 4RP 89. They were counting the pills when Shaffer received a phone call from his parents who said the police were looking for him to question him about a pharmacy robbery. Even though he thought it was just a matter of time before he got caught, he and Nyland went to sell the pills and made $9000 to $10,000. 4RP 90-92. They divided the money and Nyland dropped him off at a Chevron where he met some friends and they rented a room at the Silver Cloud Inn to party. 4RP 92-96. Later that night, Shaffer and a friend left the hotel room to sell more OxyContin and on their way back they were stopped by the police. Shaffer was arrested and charged with second degree robbery. 4RP 97-102. He pleaded guilty to reduced charges in exchange for his testimony. 102-03, 152-54, 159-60.

Detective Denny Wood was assigned to conduct a follow-up investigation of the robbery. 5RP 30. Wood testified that he contacted Scott Bennett and showed him a photo montage of four suspects. Bennett said that he was 75 percent certain that Joseph Shaffer was the driver of the getaway car. 5RP 35-36. Wood also contacted Sandra Roberts and Brittany Lyon and showed them the same photo montage. Neither Roberts nor Lyon could identify anyone in the photographs. 5RP 36-37.

Karl Phillips is Nyland's stepfather. 5RP 64-65. Phillips testified that he recalled the date of November 30, 2008, the Sunday after Thanksgiving, because he and Nyland went out to family property on Vashon Island. 5RP 65-66. They took the 8 a.m. ferry and stayed until nightfall clearing brush and debris to move a motor home onto the property. 5RP 66-67. Nyland moved into the motor home a few days later and still lives on the property. 5RP 67, 75.

b. Jury Instructions

During discussion of jury instructions, defense counsel proposed instructions for the definition of threat. 5RP 79-80. Defense counsel argued that "because threat is used in the definition of a robbery second, and without that instruction or an instruction to that effect, I believe it leaves the jury to speculate as to what a threat is." 5RP 85-86. Defense counsel had previously explained that after a discussion with Nyland, they decided not to request an instruction on the lesser included offense of theft in the first degree. 5RP 57-58. The trial court refused to give the instruction, concluding that State v. Gallagher "basically says that you don't give an instruction on a definition of threat which would be Defense's 1 and 2 in a robbery case." 5RP 80, 86.

c. Jury Questions During Deliberations

During deliberations, the jury submitted three written questions to the court. CP 36-38. The record reflects that the court informed defense counsel and the prosecutor that the jury asked to view the security video that was previously played during the trial. 6RP 51-52. With the consent of defense counsel and the prosecutor, the video was played for the jury. 6RP 52-53. The record contains no discussion of the two other questions submitted by the jury, but the jury's written questions contain a written response from the trial court. CP 36-38.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO GIVE A JURY INSTRUCTION ON THE DEFINITION OF THREAT THEREBY RELIEVING THE STATE OF ITS BURDEN TO PROVE EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

Reversal of Nyland's conviction of robbery in the second degree is required because the trial court erred in refusing to give a jury instruction on the definition of threat thereby relieving the State of its burden to prove every element of the crime beyond a reasonable doubt.

"It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable

doubt." State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).[3] The State must prove each essential element of a crime beyond a reasonable doubt. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000)(citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). An essential element of a crime is one that must be proven to "establish the very illegality of the behavior." State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)(citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991, 104 S. Ct. 481, 78 L. Ed. 2d 679 (1983)).

During discussion of jury instructions, defense counsel proposed two instructions on the definition of threat based on a modification of WPIC 2.24:[4]

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury to the person threatened or

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[3] The Legislature has codified the State's burden: Every person charged with the commission of a crime is presumed innocent unless proven guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt. RCW 9A.04.100(1).

[4] Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any person or to do any act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

WPIC 2.24 in relevant part.

to any other person or to do any act that is intended to harm substantially the person threatened or another with respect to that person's health or safety.

CP 30.

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury to the person threatened or to any other person or to do any other act that is intended to harm the person threatened or another with respect to that person's health or safety.
>
> To be a threat, a statement or act must occur in a context or under circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

CP 31.

The trial court refused to give an instruction on threat relying on State v. Gallagher, 24 Wn. App. 819, 604 P.2d 185 (1979). The court concluded that under Gallagher, a definition of threat "is not appropriate in a robbery case." 5RP 86.

The court proceeded to instruct the jury on the elements of robbery and gave the "to convict" instruction:

> A person commits the crime of robbery in the second degree when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or the person or anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial.

CP 52 (Instruction 11).

> To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 30th day of November, 2008, the defendant unlawfully took personal property from the person or in the presence of another;
>
> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear or injury to that person or to the person of another;
>
> (4) That force or fear was used by the defendant to obtain or retain possession of the property; and
>
> (5) That any of these acts occurred in the State of Washington.

CP 53 (Instruction 12 in relevant part).

Jury instructions are proper if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Here, the trial court failed to instruct the jury on the legal definition of threat based on its misapprehension of State v. Gallagher. In Gallager, the trial court gave a jury instruction on the definition of threat:

> Threat means to communicate, directly or indirectly the intent: to cause bodily injury in the future to the person threatened or to any other person; or, to do any act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationship.

Gallagher, 24 Wn. App. at 821 (emphasis added).

Division Three of this Court held that because the definition of robbery requires that the threatened harm occur while the robbery is taking place, "[i]nsofar as the instruction includes threats of harm to take place subsequent to the robbery, it is error." Id. at 821-22.

Contrary to the trial court's conclusion, the Gallagher court did not hold that it would be error to give a jury instruction on the definition of threat. As this Court determined in State v. Shcherenkov, 146 Wn. App. 619, 191 P.3d 99 (2008), the statutory definition of threat in RCW 9A.04.110(27)[5] applies to robbery offenses and in the robbery context, the jury instruction must require that the threatened use of force be immediate. Id. at 625. Although the alternative jury instructions proposed by defense counsel did not include the term "immediate," the instructions were adequate in light of the other instructions given by the court which required threatened use of immediate force. "Parties are entitled to [jury] instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." State v. Marchi, 158 Wn. App. 823, 833,

[5] Former RCW 9A.04.110(27) provides in relevant part that threat means to communicate, directly or indirectly the intent to cause bodily injury in the future to the person threatened or to any other person or to do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.

243 P.3d 556 (2010)(citing State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003)).

Consequently, the trial court erred in failing to give a jury instruction on the definition of threat and the record substantiates that the error was not harmless beyond a reasonable doubt. In order to hold that an error in jury instruction is harmless, an appellate court "must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Brown, 147 Wn.2d at 341 (citing Neder v. United States, 527 U.S. 1, 19, 110 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

The record reflects that the State's evidence to establish use or threatened use of force was insufficient. Lyon testified that "a gentleman came up to the counter" and handed her a note that stated, "Please give me all your OxyContin." 2RP 5-7. The man was dressed entirely in black wearing a ski mask. He did not say or indicate that he had a weapon but she was frightened because he had his hand in his pocket. 2RP 7, 9-10, 13-14. Even if the hands were in clear view, she would give him the Oxycontin because it is Walgreens' policy to "just do what they say." 2RP 9-10, 13. The pharmacist, Sandra Roberts, testified that when the technician brought her the note, she took all the OxyContin out of the narcotics cabinet, put them in a plastic bin, and triggered the alarm system. 2RP 18-19. Walgreens' policy is to "give them what they want." 2RP 19.

When she went to the counter, she saw a man dressed completely in black wearing a ski mask. He did not say anything and did not have a weapon but she felt frightened. 2RP 21-22, 27-28.

Importantly, the jury submitted questions during deliberations which reflect that it had doubt about what constitutes threatened use of immediate force, an element of robbery in the second degree:

> Is the definition of Robbery based on the intent of the defendant to threaten or is it based on the perception of the victim.

CP 36-38 (Jury Question dated Dec. 21, 10).

> What is the instruction/definition for Robbery in the 3rd degree?

CP 36-38 (Jury Question dated Dec. 22, 10).

Furthermore, because the court refused to give an instruction on the definition of threat, defense counsel could only argue during closing, "Does a hand in a pocket constitute use of force or threat of use of force? That's something you need to decide." RP 40-41.

In light of the insufficiency of the evidence, the jury's questions regarding threat, and the defense's inability to refer to a jury instruction defining threat to argue its theory of the case, this Court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Neder, 57 U.S. at 19. Reversal is required because the

trial court's failure to give a jury instruction on the definition of threat relieved the State of its burden to prove every element of the crime beyond a reasonable doubt.

2. THE TRIAL COURT VIOLATED NYLAND'S CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF TRIAL BY RESPONDING TO JURY QUESTIONS DURING DELIBERATIONS IN HIS ABSENCE.

Reversal is required because the trial court violated Nyland's constitutional right to be present at all critical stages of trial by responding to jury questions during deliberations in his absence and the violation was not harmless beyond a reasonable doubt.

Due Process guarantees a criminal defendant the right to be present at all critical stages of a trial. U.S. Const. amend. V, VI, XIV; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Unlike the United States Constitution, the Washington Constitution provides an explicit guaranty of the right "to appear and defend in person, or by counsel." Wash. Const. art. I, section 22. The right under the state constitution to "appear and defend" is arguably broader than the federal due process right to be present. State v. Irby, 170 Wn.2d 874, 885 n. 6, 246 P.3d 796 (2011).

"It is settled in this state that there should be no communication between the court and the jury in the absence of the defendant." State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). Once a defendant raises the possibility that he was prejudiced by an improper communication between the court and the jury in his absence, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1130 (1997); Irby, 170 Wn. at 885-86.

CrR 6.15(f)(1) pertains to questions from the jury:

> The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response, and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing.

The jury here submitted three separate written questions which contain a written response:[6]

> Question: May we see the video after our break.
>
> Response: Yes.
>
> Dated Dec. 21, 10.

[6] The jury questions are attached as an appendix.

Question: Is the definition of Robbery based on the intent of the defendant to threaten or is it based on the perception of the victim.

Response: Please refer to your instructions.

Dated Dec. 21, 10.

Question: What is the instruction/definition for Robbery in the 3rd degree?

Response: Please consider only the charges in the instructions.
Dated Dec. 22, 10.

All three written jury questions containing responses were filed on December 22, 2010 with signatures of the judge and attorneys or "telephonic approval" written on the signature lines. CP 36-38.

The verbatim report of proceedings for December 21, 2011 reflects that shortly after the jurors began deliberations, they asked to view the security video previously played during the trial. Both defense counsel and the prosecutor were present and had no objection so the court played the video for the jury and adjourned. 6RP 51-53. The Clerk's Minutes for December 21, 2010 indicate that jury deliberations commenced at 12:32 p.m. and the jury was excused for the day at 4:07 p.m. Supp. CP ___ (Clerk's Minute Entry, 12/22/2010). The verbatim report of proceedings for December 22, 2010 only reflect that the jury reached a verdict, the court read the verdict and polled the jury, and the jury was excused. 7RP

2-6. The Clerk's Minutes for December 22, 2010 indicate that jury deliberations resumed at 9:01 a.m., the jury reached a verdict, attorneys were notified, and the jury was seated at 10:50 a.m. Supp. CP ___ (Clerk's Minute Entry, 12/22/2010). There is no record at all of any discussion of the jury's other two questions.

In Caliguri, our Supreme Court held that replaying a tape for the jury during deliberations in the defendant's absence was harmless error because a third party was present during the judge's communication with the jury. Caliguri, 99 Wn.2d at 509. In State v. Johnson, 56 Wn.2d 700, 709, 355 P.2d 13 (1960), the Court held that the court's communication with the jury in the absence of the defendant was harmless error because the record substantiated that in responding to the jury's question, the court communicated no information that was harmful to the defendant and the jury acquitted the defendant on the count to which the question related. In State v. Russell, 25 Wn. App. 933, 947-48, 611 P.2d 1320 (1980), Division One of this Court held that the court's communication with the jury in the absence of the defendant was harmless error because the court's response to the jury's question regarding a jury instruction was that "the instruction meant exactly what was written therein" and question only pertained to a codefendant.

This case is distinguishable from Caliguri, Johnson, and Russell, because there is no verbatim report of proceedings or anything else in the record that establishes what occurred when the jury submitted the other two written questions to the court and a response was provided, which leads to the only fair conclusion that Nyland was not present. As the Court reasoned in Caliguri, "[w]here the only persons with knowledge of what took place are the judge who erred and the jurors affected by the error, the argument for a conclusive presumption of error has more force." 99 Wn.2d at 509. Importantly, the jury questions were critical to the charge of robbery in the second degree. The jury's questions pertained to the essential element of threat and robbery in the third degree (although there is no such offense the jury was obviously considering a lesser included offense), which clearly indicates that the jury was uncertain whether the evidence proved beyond a reasonable doubt that Nyland committed robbery in the second degree. Furthermore, the prejudicial effect of the court's unrecorded communication with the jury regarding what constitutes threat is compounded by the fact that the court had erroneously refused to instruct the jury on the definition of threat based on its misapprehension of the law.

Reversal of Nyland's conviction of robbery in the second degree is required because he was denied his constitutional right to be present at all

critical stages of trial, and without a record the State cannot prove that the court's improper communication with the jury during his absence was harmless beyond a reasonable doubt.[7] See Irby, 170 Wn.2d at 885-87.

3. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED NYLAND HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The doctrine applies to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, the trial court erred in refusing to the give an essential jury instruction on the definition of threat based on its erroneous interpretation of the law and improperly communicated with the jury in Nyland's absence in violation of his constitutional right to be present at all critical stages of trial. Reversal is required because the cumulative effect of the court's errors denied Nyland his constitutional right to a fair trial.

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[7] Division One of this Court reaches a somewhat contrary conclusion in State v. Jasper, 158 Wn. App. 518, 245 P.3d 228 (2010), review granted, 170 Wn.2d 1025 (2011), but this Court is not bound by the decision particularly when the Washington Supreme Court has granted review of the case.

4. THE EVIDENCE WAS INSUFFICIENT TO CONVICT NYLAND OF ROBBERY IN THE SECOND DEGREE BEYOND A REASONABLE DOUBT.

Reversal and dismissal of Nyland's conviction of robbery in the second degree is required because the evidence was insufficient to prove robbery in the second degree where there was no evidence that the taking of the OxyContin was against a person's will by Nyland's use or threatened use of immediate force, violence, or fear or injury to that person.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, section 3. "[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.' " State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). [8]

[8] The United States Supreme Court noted, "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty." In re Winship, 397 U.S. at 364.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1996), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

"It is generally held that, if the taking of the property be attended with such circumstances of terror or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person, it is robbery." State v. Redmond, 122 Wn. 392, 393, 210 P. 772 (1922). "Any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction." State v.

Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992)(citing State v. Ammlung, 31 Wn. App. 696, 704, 644 P.2d 717 (1992)).

The trial court provided the jury with the following "to convict" instruction:

> To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 30th day of November, 2008, the defendant unlawfully took personal property from the person or in the presence of another;
>
> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear or injury to that person or to the person of another;
>
> (4) That force or fear was used by the defendant to obtain or retain possession of the property; and
>
> (5) That any of these acts occurred in the State of Washington.

CP 53 (Instruction 12 in relevant part).

The State's evidence to establish robbery in the second degree consisted of testimony from the pharmacy technician, Brittany Lyon and pharmacist, Sandra Roberts. Both described the man who took the OxyContin as dressed completely in black and wearing a ski mask. 2RP 7, 21. Lyon testified that the "gentleman" came up to the counter and handed her a note that stated, "Please give me all your OxyContin." 2RP 5-6. Lyon was questioned further:

Q. Were you frightened when the man handed you the note?

A. Yes.

Q. Did he ever imply he had a weapon?

A. He didn't say it, but his hand was in his pocket.

Q. Were you concerned about that?

A. Yes.

Q. Was it the fact that he had the note, was dressed the way he was, and had his hand in his pocket the reason why you helped the pharmacist give him the OxyContin?

A. That, and also the policy with Walgreens is to just do what they say.

Q. If he hadn't been dressed that way and gave you a note, would you have just given anyone OxyContin pills?

A. Yes, because it is policy.

. . . .

Q. This person made no indication that they had a weapon; is that correct?

A. No.

Q. If I were to walk up to you with both hands in clear view and say I want all your OxyContin, you would give those pills to me because --

A. Because it is policy, yes, we are not supposed to argue with the customer if that's what they are saying because at that point we're being robbed and we have to follow policy. Yes, I would give it to you.

Q. Doesn't matter whether you believe I have a weapon or not, just policy?

A. It is policy.

Q. Under any conditions?

A. Under any condition.

2RP 9-10, 13.

Roberts testified that the man never said anything and she did not see a weapon, but she was frightened. 2RP 26-28. The man said "thanks" and ran off. 2RP 10.

The record substantiates that even when viewing the evidence in the light most favorable to the State with all reasonable inferences, the evidence is insufficient to prove the essential element that Nyland took the OxyContin against the will of Lyon and Roberts by use or threatened use of immediate force, violence, or fear or injury to Lyon or Roberts or another person. Although Lyon and Roberts said they were frightened and Lyon was concerned that the man had his hand in his pocket, they did not express fear of violence or injury, they never saw a weapon, the man made no gesture to imply that he had a weapon, and he made no threat. They gave him the OxyContin because it was Walgreens policy to do so. 2RP 13, 19. The record establishes that there was no force or threat that induced them to hand over the OxyContin. Certainly, there were no

"circumstances of terror or such threatening by menace, word, or gesture as in common experience is likely to create an apprehension of danger." Redmond, 122 Wn. at 393.

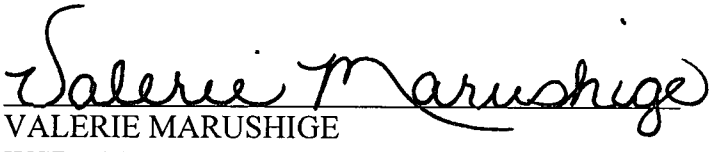
Reversal and dismissal is required because the evidence was insufficient for any trier of fact to find all the elements of the crime beyond a reasonable doubt.[9] DeVries, 149 Wn.2d at 849.

D. CONCLUSION

For the reasons stated, this Court should reverse and dismiss Mr. Nyland's conviction of robbery in the second degree or in the alternative, reverse and remand for a new and fair trial.

DATED this 2nd day of September, 2011.

Respectfully submitted,



VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Dylan Thomas Nyland

[9] This case is distinguishable from State v. Collinsworth, 90 Wn. App. 546, 966 P.2d 905 (1997) and State v. Parra, 96 Wn. App. 95, 977 P.2d 1272 (1999) which involved circumstances unique to bank robberies.

APPENDIX

12/27/2010 11978 1338364

10-1-00117-6 35594610 JYN 12-23-10

FILED
IN OPEN COURT
DEPT 21
DEC 22 2010
PIERCE COUNTY, Clerk
By _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CAUSE NO. 10-1-00117-6

STATE OF WASHINGTON,
Plaintiff,
vs.
DYLAN THOMAS NYLAND,
Defendant.

JURY QUESTION

QUESTION: May we see the video after our break.

21 Dec 10
PRESIDING JUROR / DATE

RESPONSE: Yes.

DATED this 21st day of December, 2010.

JUDGE FRANK E. CUTHBERTSON

Telephonic approval
MAUREEN GOODMAN
Attorney for Plaintiff
WSBA #34012

Telephonic approval
MICHAEL UNDERWOOD
Attorney for Defendant
WSBA #13218

12/27/2010 11:08 1338366

10-1-00117-6 35594623 JYN 12-23-10

FILED
IN OPEN COURT
DEPT 21
DEC 22 2010
PIERCE COUNTY, Clerk
By DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CAUSE NO. 10-1-00117-6

STATE OF WASHINGTON,
Plaintiff,
vs.
DYLAN THOMAS NYLAND,
Defendant.

JURY QUESTION

QUESTION: Is the definition of Robbery based ~~Does~~ ~~Require the theft to create the fear of being threaten~~ on the intent of the defendant to threaten or is it based on the perception of the victim.

21 Dec 10
PRESIDING JUROR / DATE

RESPONSE: Please refer to your instructions.

DATED this 21st day of December, 2010.

JUDGE FRANK E. CUTHBERTSON

telephonic approval
MAUREEN GOODMAN
Attorney for Plaintiff
WSBA #34012

MICHAEL UNDERWOOD
Attorney for Defendant
WSBA #13218

ORIGINAL

10-1-00117-6 35594619 JYN 12-23-10

FILED
IN OPEN COURT
DEPT 21
DEC 22 2010
PIERCE COUNTY, Clerk
By _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

CAUSE NO. 10-1-00117-6

STATE OF WASHINGTON,
Plaintiff,
vs.
DYLAN THOMAS NYLAND,
Defendant.

JURY QUESTION

QUESTION: What is the instruction/definition for Robbery in the 3rd degree?

22 Dec 10
PRESIDING JUROR / DATE

RESPONSE: Please consider only the charges in the instructions.

DATED this 22nd day of December, 2010.

telephonic
JUDGE FRANK E. CUTHBERTSON

MAUREEN GOODMAN
Attorney for Plaintiff
WSBA #34012

telephonic
MICHAEL UNDERWOOD
Attorney for Defendant
WSBA #13218
Richard Whitehead

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Dylan Thomas Nyland, DOC # 346322, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of September 2011, in Kent, Washington.

Valerie Marushige

VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851